

THE MODERN CHARACTER OF WAR: A REEXAMINATION OF THE LAW OF ARMED CONFLICT

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ABSTRACT

Italian Air Marshall Giulio Douhet once prophesied that “Victory smiles on those who anticipate the changes in the character of war, not upon those who wait to adapt themselves after the changes occur.” Although the quote, forever burned in my mind from freshman year at the Academy, rings true for strategists, the laws which govern warfare respond painfully slowly to evolutions in its character. Therefore, as new domains of conflict, such as space and cyberspace, are opened and warfare shifts increasingly towards these non-kinetic methods of exercising power between rival actors, the Law of Armed Conflict (LOAC) ought to be revised to encompass these threats. This paper will advocate for a reexamination of the terminology used in the statutory implementation of LOAC as well as compare how these new adaptations will fit within Just War Theory. Furthermore, we see an increase in cybercrime as acted by states yet do little about it statutorily. Ultimately, I conclude that as state-sponsored kinetic warfare becomes less and less common, LOAC ought to include focus on non-state and non-kinetic policies, such as cyber warfare or civilian outsourcing, enabling state sponsored kinetic or non-kinetic retaliation and deterrence, while maintaining the spirit of the law in pursuit of more stable peace on the global order.

OVERVIEW AND DISCLAIMER¹

Although neophyte to this field, the current understanding on this subject matter has led the author to this conclusion. The purpose of this article is to advocate for a position beyond the status quo. The current *lex Lata* is insufficient for the changing character of war and therefore, the paper proposes a *lex ferenda* solution by restructuring the language. It is common practice in international law to operate wherein any action is allowed unless a specific treaty, code, or norm necessitates otherwise. Therefore, this paper will unpack the current issues with the status quo and my recommendation to update the language of the Law of Armed Conflict (LOAC).

¹ The views expressed here are entirely my own and do not necessarily reflect the views of USAFA, the DoD, Washington University, or any of their respective affiliates. Great thanks to the Washington University Undergraduate Law Review for this chance at publication. I would additionally like to thank the United States Air Force Academy, particularly the Law and Philosophy Departments, as well as Martinson Honors Program for affording me the opportunities to study and engage with this material. I also want to thank Dr. Logan Sisson, Professor Jeffery Biller, and Professor Jennifer Sheppard for their continued support and assistance on this project.

The Status Quo: LOAC and the Changing Threat

Under the current legal paradigms, the focus primarily remains on kinetic, state-sponsored aggressors, and actors. The Law of Armed Conflict is governed through the U.N. Charter in an effort to prevent actions in war and going to war which are deemed internationally unjust or wrongful. Some of these treaties included U.N. Charter Articles 2 § 4 and 51 and U.N. General Resolution 3341. Additionally, internationally wrongful acts apart from war are governed under a separate treatise, The U.N. International Law Handbook § V. “International Responsibility” §§ 20. Articles on the Responsibility of States for Internationally Wrongful Acts.

U.N. General Resolution 3314²—defines aggression as “the use of armed force by a State against the sovereign territorial integrity or political integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations.”³ To unpack the

² U.N. Gen. Res 3314 – Definition of Aggression, (1974).

³ James P. Terry, The Lawfulness of Attacking Computer Networks in Armed Conflict and in Self-Defense in Periods Short of Armed Conflict: What Are the Targeting Constraints., *Military Law Review* 169 *Mil. L. Review*, 75, (2001) https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/milrv169&id=85&men_tab=srchresults.

definition of aggression into individual requirements, the following criterion must be met: (1) that the action is done by a state; (2) that the recipient of the action is a State; (3) that the actor uses armed force; and (4a) that it violates either territorial integrity; political integrity, and/or political independence; or (4b) that the action is inconsistent with the U.N. Charter. How, then, does the law of armed conflict take certain types of threats into account?

First, in light of the primary elements, for simplicity element 4b will be disregarded temporarily. In essence, actors who seek to violate the sovereignty of a nation, or the autonomy of a nation, can only be retaliated against or found to have committed acts of aggression should they be a state actor. Just War theorist Brian Orend writes that “for an international act to count as aggression, it must not merely be objectionable or even clearly damaging to a country’s interests. It must, at the same time, involve the infliction of serious, direct physical force.”⁴ This may work for a conventional threat, such as the invasion of Poland by the Third Reich or of Kuwait in the Gulf War; however, many

⁴ Brian Orend, *The Morality of War*. 2d ed. Peterborough, Ontario: Broadview Press, 35 (2013)

conflicts are shifting away from physical invasion in lieu of more clandestine or ambiguous methods.⁵

Furthermore, should a nation elect to target a non-state entity, such as a corporation that operates outside of the geographic boundaries of a nation, including but not limited to space or even the open seas, it would also not be found in violation of the principles of aggression. This presents a dilemma for many state actors as there are minimal LOAC repercussions to these sorts of situations. Another potential situation where there is ambiguity is that of a cyber-attack. Because there is an emphasis on “armed force”, the ability to prosecute hackers or other offensive cyber operators is often hampered by the status quo. Yet, these types of attacks can do significant damage, such as the Colonial Pipeline Attack of 2020.⁶ Other attacks include attacks on the U.K. Health Service System in 2017⁷, the Canadian Revenue

⁵ The Changing Nature of Warfare: Transcript and Summary, Center for Strategic Studies, CAN Corporation, (2004)

https://www.cna.org/archive/CNA_Files/pdf/d0011005.a1.pdf.

⁶ Colonial Pipeline Cyber Incident, Department of Energy, (2021).

<https://www.energy.gov/ceser/colonial-pipeline-cyber-incident>

⁷ Browne, Ryan. “UK Government: North Korea Was behind the Wannacry Cyber-Attack That Crippled Health Service.” CNBC. CNBC, (2017).

<https://www.cnbc.com/2017/10/27/uk-north-korea-behind-wannacry-cyber-attack-that-crippled-nhs.html>.

Agency in 2020⁸, and a Canadian Children’s Hospital in 2022⁹, and ultimately, the current language used to deter aggression is insufficient to deal with contemporary threats and the current character of war.

What about violation of the U.N. Charter? Unfortunately, the Charter’s language is riddled with the same original diction that inhibits its requisites for aggression and takes no account of the evolution of the character of war. The central provision of U.N. Charter Article 2 § 4¹⁰ states “All Members shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations...”¹¹ Albeit better, this language still leaves core vulnerabilities regarding

8 Moorcraft, Bethan. “CRA Cyberattacks: A Prime Example of Credential Stuffing.” Insurance Business Canada. Insurance Business, (2020).

<https://www.insurancebusinessmag.com/ca/news/cyber/cra-cyberattacks-a-prime-example-of-credential-stuffing-233096.aspx>.

9 Freidman, Gabriel. “The Impact of Ransomware Attacks on Critical Infrastructure in Canada” Financial Post. Financial Post, (2023).

<https://financialpost.com/cybersecurity/ransomware-attacks-critical-infrastructure-canada>.

10 U.N. Charter Article 2 § 4, (1945).

11 Michael Byers, War Law: Understanding International Law and Armed Conflict. 7 (2007)
https://books.google.com/books/about/War_Law.html?id=6f9Di2nq1hQC

strategic ambiguity, which prevent effective administration of peacekeeping justice. This ability to isolate manners inconstant can provide some flexibility in interpretation for taking action against the previously outlined actions. However, nations relying on this ability to interpret the law relies on a “common law” reading of the U.N. The Charter, which although the U.S. certainly relies on that paradigm, the majority of the rest of the world, even other western powers, relies on a “civil law” interpretation which responds more effectively to well-codified and enumerated restrictions and limits on actions.

First, the language leaves out the critical term “political integrity” as included in the definition of aggression. This leaves a crippling vulnerability as seen with election tampering by aggressive states such as China and Russia in both U.S. and other NATO elections, which, although covered by the blanket term “political sovereignty”, leaves a vulnerable gray area that malicious actors can exploit. Second, the language clearly refers only to members, which makes its enforceability a function of acceding to the rules in the first place. This can effectively leave out non-state actors, or

belligerent states who refuse to agree to the terms and conditions of U.N. Membership, which the term “international relations” only reinforces. This treatise-based approach is an understandable limiting factor of the treaty, however, this sort of shortfall contributed to the demise of the U.N.’s predecessor, The League of Nations.¹² Third, the “threat and use of force” again clearly refers to kinetic force. When examining the diction of cyber and space capabilities, even information warfare, “force” is seldom a term used in that context. Therefore, in light of these issues, the provision of Article 51 was added.

Article 51 of the U.N. Charter¹³ states, “Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack against members of the United Nations [occurs], until the Security Council has taken measures necessary to maintain international peace and security.”¹⁴ Again, the language refers to an “armed attack”, essentially denying retaliatory measures in response to cyber

¹² *Failures of the League of Nations in the 1930s - paris peace treaties and the League of Nations, to 1933 – national 5 history revision - BBC bitesize, BBC News.* BBC. (2023) <https://www.bbc.co.uk/bitesize/guides/zbg4t39/revision/9>

¹³ U.N. Charter Article 51, (1945).

¹⁴ Michael Byers, *War Law: Understanding International Law and Armed Conflict.* 7 (2007) https://books.google.com/books/about/War_Law.html?id=6f9Di2nq1hQC

threats or nonstate actors, even if those actors receive support from a sovereign nation. It also denies private entities the right to retaliation or self-defense against state-sponsored attacks. Therefore, should a nation, let's say Russia for this example, decide to use Anti-Satellite (ASAT) capabilities on a satellite owned and operated by Google, Microsoft, or StarLink, those companies would have no right to defend themselves unless that attack was physical, as opposed to using digital means to shut down the satellite. Even further, it would fall on their respective sovereigns to protect them as is it both unfeasible and unorthodox for private security to wage war against an adversarial nation, or even worse to create series of micro wars between embattled corporations and organizations.

Unfortunately, the changing environment will only further exacerbate these issues. As Arthur Van Coller argues, "Fifth-generation warfare will see new dimensions and perspectives regarding the options available to military and political commanders and will be decidedly influenced by information dominance through sustained cyber technologies

and military force.”¹⁵. “Information dominance” decidedly fits outside of the normal purview of armed conflict and yet continues to pose a constant threat to the sovereignty of nations and their constituent entities. Michael E. Smith advocates that:

Technological change poses a major challenge to the rules of war under the Law of Armed Conflict (LOAC) and related instruments of international humanitarian law. Weapons development often proceeds much faster than the rules of conflict can be negotiated during peacetime, while the pressures of combat lead states to bend if not completely break those rules during wartime. Yet there is little consensus in the academic literature on the role of technological change in furthering or undermining international cooperation on humanitarian issues. We also lack a systematic analysis of how states attempt to balance the demands placed on them as chief rule-makers in international politics with the rapid pace of modern technological change. Most general theories of international relations do not systematically incorporate technology and technological change into their analysis, except perhaps as ad hoc idiosyncratic variables, as when discussing sources of uneven economic growth or dramatically innovative military technologies, such as nuclear weapons. The opposite problem of this tendency is to treat technology as so pervasive-as, for example, a fundamental component of globalization-that one finds it difficult to isolate any discrete cause and effect relationships based on it.¹⁶

¹⁵ Arthur Van Collier, *The History and Development of the Law of Armed Conflict* (Part II). pg 1, Sabinet: African Journal, (2015).
<https://journals.co.za/doi/abs/10.10520/EJC-6062b9d86>.

¹⁶ Michael E. Smith. *War, Torture, and Terrorism: Technology Change, Rule Change, and the Law of Armed Conflict*: 16: W., Taylor & Francis. 1, (2008)
<https://www.taylorfrancis.com/chapters/edit/10.4324/9780203888452-16/technology-change-rule-change-law-armed-conflict-michael-smith>.

Unpacking this a bit further, the inherent ambiguity of emerging technology in the sphere of international LOAC drives one of the more pressing contemporary issues of modern warfighting. Without clear guidance that addresses the root issue rather than individual technologies, this issue will continue to persist. Therefore, as technology continues to evolve and the character of war changes, the Law of Armed Conflict must adapt to face these coming changes.

Additional Legal Considerations

U.N. General Assembly Resolution 56/83¹⁷ discusses internationally wrongful acts, which often bear direct impact on the likelihood of armed conflict. From abrogation of treaties to other types of offenses, it outlines levels of responsibility such as in Article 1 when it states “Every internationally wrongful act of a State entails the international responsibility of that State.”¹⁸ This provides a general context about the implications of internationally wrongful acts, but mere establishment of responsibility only provides some basis

¹⁷ The U.N. International Law Handbook § V. “International Responsibility” §§ 20. Articles on the Responsibility of States for Internationally Wrongful Acts. (2001).

¹⁸ *Id.* at Article 1. (2001).

for attribution. That is why additional clarification is provided with Article 3,¹⁹ which provides greater clarification; Articles 12-15,²⁰ which deal with breaches of international agreements; and Article 17,²¹ which outlines the power of control of the internationally wrongful act.

However, the Articles also outline key exceptions, including self-defense, counter measures, and *force majeure* among others.²² They also outlines key punitive processes, one of the most critical of which is found in Articles 30 and 31. Article 30 states, “The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”²³ Article 31 states, “(1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. (2) Injury includes any

¹⁹ *Id.* at Article 3. (2001).

²⁰ *Id.* at Article 12-15. (2001).

²¹ *Id.* at Article 17. (2001).

²² *Id.* at Article 20-27. (2001).

²³ *Id.* at Article 30. (2001).

damage, whether material or moral, caused by the internationally wrongful act of a State.”²⁴

These critical obligations directly relate to LOAC as they determine the legal foundation for condemnation of acts and the necessity of sought rectification. This is crucial because under normally understood legal principles, an act is allowable unless explicitly stated otherwise. Therefore, acts ought to be considered against the paradigm if they are internationally wrongful. Furthermore, the plethora of legal foundations in this treatise alone provides grounds to comprehend the legal framework of the system.

Additionally, the Geneva Conventions, established in 1949 also outline the key principles of carrying out warfare, relating to issues such as fair treatment of prisoners and immunity of civilians.²⁵ For example, Geneva Convention IV, Article 4 defines “protected individuals” as “persons protected

²⁴ The U.N. International Law Handbook § V. “International Responsibility” §§ 20. Articles on the Responsibility of States for Internationally Wrongful Acts. Article 31. (2001).

²⁵ International Committee of the Red Cross, *The Geneva Conventions of 1949 and their additional Protocols*, International Committee of the Red Cross, (2020).
<https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>

by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals...”²⁶ The article continues to expand on these principles, but even this short excerpt highlights the governing law.

Ultimately, beyond even the primary laws related to armed conflict, additional laws exist to frame and define the law in greater detail. This affords a greater definition to LOAC. Therefore, if LOAC ought to effectively address the complexities of war’s changing character, individuals seeking to make such amendments align with all of the aspects of LOAC currently in effect, thus ensuring the legal basis remains intact.

Just War Theory

However, the Law of Armed Conflict is merely the statutory enforcement of a greater principle. It’s aims are to outline the legal limits for actions, as opposed to conveying the ultimate intent, as seen with U.N. Article 2 § 4. In essence,

²⁶ Geneva Convention IV, Article 4 (1949).

LOAC is the letter of the law as opposed to the spirit of the law, or just war theory. Broken into two critical components, *jus ad bellum* (justice to war) and *jus in bello* (justice in war), the theory encompasses the conventional thought on the ethical way of conducting conflict. Brian Orend breaks down the two components in the following ways.

1. *Jus ad Bellum*

In short, *jus ad bellum* relates to the reasons to go to war. It directly provides requisites to examine both consequences and principles associated with the decision to wage war.

Orend writes:

The rules of *jus ad bellum* are addressed, first and foremost, to heads of state. . . . [A]ggressive leaders who launch unjust wars commit “crimes against peace.” What constitutes a just or unjust resort to armed force is disclosed to us by the rules of *jus ad bellum*. Just war theory contends that, for...war to be justified, a political community, or state, must fulfil [each] one of the following six requirements: (1) just cause, (2) right intention, (3) proper authority and public declaration, (4) last resort, (5) probability of success, and (6) proportionality.²⁷

In essence, these principles outline the necessary requisites to conduct war. Of particular interest are numbers four and six. The other components, though critical, can be

²⁷ Brian Orend, War. Stanford Encyclopedia of Philosophy, 3-5, (2005)
<https://web.cs.ucdavis.edu/~rogaway/classes/188/materials/war.pdf>.

viewed more ubiquitously and therefore do not pose a potential issue with non-kinetic and non-state threats. First, on the principle of last resort, a nation must use warfare, by any means, as a final alternative. Of the instruments of world power, diplomacy, information, military, and economics, commonly abbreviated DIME, military remains the last resort. Therefore, a nation wishing to exercise its power over an adversary must first attempt other methods before resorting to warfare. Second, proportionality establishes that nations must adopt an approach of balance. Orend writes “A state must, prior to initiating a war, weigh the *universal* goods expected to result from it, such as securing the just cause, against the *universal* evils expected to result, notably casualties. Only if the benefits are proportional to, or ‘worth’, the costs may the war action proceed.”²⁸ A missile strike taking eighty-three lives could not warrant a strike which takes several thousand. The damage done must be roughly equivalent, as to both provide deterrence and prevent undue escalation of a conflict which LOAC seeks to avoid.

²⁸ Brian Orend, War. Stanford Encyclopedia of Philosophy, 3-5, (2005) <https://web.cs.ucdavis.edu/~rogaway/classes/188/materials/war.pdf>.

Yet, calculating approaches must also account for more. Orend writes, “It is wildly improbable that we could ever devise a completely satisfying set of cost-benefit formulae with regard to wartime action. Far better, I believe, to stick to a firm set of clear and universal rules to guide conduct, which is what the rest of just war theory strives for.”²⁹ This set of rules is critical, as many nations, particularly those likely to engage in aggression, will continue to operate in manners inconsistent with the spirit of LOAC, even if they can work within the letter of the law. Future examinations of proportionality ought to focus on how the balance can be found without creating such a set of formulae. Therefore, for a nation to go to war, they must first examine if these criteria are critically met, considering the totality of circumstances with each action.

However, Orend is not the only Just War Theorist who can provide insights into this current issue. Dealing primarily with *Jus ad Bellum*, Aquinas advocates that a war can only be just if it meets the following criterion: (1) it is called by sovereign

²⁹ Brian Orend. *The Morality of War*. 2d ed. Peterborough, Ontario: Broadview Press, 62-63, (2013).

authority, (2) it has just cause, (3) the combatants have the correct intentions, and (4a) combatants cannot intend intrinsically evil actions, (4b) good actions are to be intended and evil only tolerated in necessity, and (4c) there is proportionality where the good outweighs the evil.³⁰

Aquinas's approach to Just War Theory is similar to Orend's approach in that it aims to accomplish the same primary objective. A critical point to address is that of the sovereign authority. On the idea of sovereignty, often it is assumed that a state or other actor holds sovereignty in accordance with international legal personality. Yet, if an entity takes belligerent or aggressive action, but does not have sovereignty, the methods of redress are often much more difficult to rally around as there are not as many governing rules relevant to nonstate or otherwise non-sovereign actors. With the increasing rise of "little green men"³¹ or radical extremist groups, it is interesting to note a lack of concrete Just War Theory relating to these issues.

2. *Jus in Bello*

³⁰ Aquinas, T. *Summa Theologica, Question 40. war, SUMMA THEOLOGIAE: War (Secunda Secundae Partis, Q. 40)*. New Advent. (2017) <https://www.newadvent.org/summa/3040.htm>.

³¹ Vitaly Shevchenko, "Little Green Men" or "Russian invaders"? BBC News (2014), <https://www.bbc.com/news/world-europe-26532154>.

However, *jus ad bellum* only determines if the conflict may lawfully begin. Unlike *jus ad bellum*, *jus in bello* focuses on the nature of the fighting itself. Here, Orend outlines the factors of that determine what is right conduct in armed conflict, arguing:

Jus in bello refers to justice in war, to right conduct in the midst of battle. Responsibility for state adherence to *jus in bello* norms falls primarily on the shoulders of those military commanders, officers and soldiers who formulate and execute the war policy of a particular state. They are to be held responsible for any breach of the principles which follow below...There are several rules of external *jus in bello*: (1) Obey all international laws on weapons prohibition, (2) Discrimination and Non-Combatant Immunity, (3) Proportionality, (4) Benevolent quarantine for prisoners of war (POWs), (5) No Means *Mala in Se* [(inherently evil acts for their own sake)], and (6) No reprisals.³²

Similarly, to *jus ad bellum*, certain components are more pertinent to the changing character of war. These are elements two, three, and five, which will be examined in greater detail later in the paper. First, this paper will examine the nature of non-combatant immunity. In short, civilians and those not engaging in hostilities (POWs, wounded) are not valid targets in conflict. Second, to examine the nature of proportionality, similar to *jus ad bellum*, the action must be

³² Brian Orend, War. Stanford Encyclopedia of Philosophy, 5-6, (2005)
<https://web.cs.ucdavis.edu/~rogaway/classes/188/materials/war.pdf>.

within a reasonable level of retaliatory damage to justify an action in conflict. Finally, the avoidance of evil for its own sake. The primary examples often referenced with *Mala in Se* are disguising active hostilities and the Red Cross or using prisoners as soldiers against their own nation. Included here also are biological agents and other non-recoverable methods of inflicting damage.

Ultimately, the principles of Just War Theory provide the ethical foundations, the spirit of the law, relevant to conflict. The sections of particular interest can shed light on how a future fight can be waged justly.

Proposed Solution

Considering the changing character of war, this paper proposes the following revisions to the Definition of Aggression, Article 2 § 4, and Article 51:

- (1) Aggression: Aggression is an action by a State or other state-associated actor against the territorial sovereignty, political integrity, or political independence of another State or actor, or in any manner inconsistent with the Charter of the United Nations.

(2) Article 2 § 4: All members and subsidiary components shall refrain from acting, or threatening to take action, such that an autonomous entity would experience a violation of territorial integrity, political integrity, or political independence, or in any other manner inconsistent with the Purposes of the United Nations.

(3) Article 51: Nothing in the present charter shall impair the inherent right of individual or collective self-defense if a violation of sovereign autonomy occurs, such that said defense is proportional, until the Security Council has taken measures necessary to maintain international peace and security.

As a brief justification for each revision, the principal spirit of the law ought to be made intact, but the language adapted to fit a more complex world.

First, the revision of aggression acknowledges non-state actors and victims, as well as redefining the action to focus on the results rather than the means. Therefore, actions which violate sovereignty are considered aggressive as opposed to ones which merely employ armed forces. This is vital, because the spirit of the law is to prevent harm to member states and

promote peace, an aspiration currently subverted by the lack of international accountability mechanisms.

Second, for the revision of Article 2 § 4, the focus is not only on the actions, but also that subsidiary organizations, such as a U.S. company being hacked by a Russia-based hacking firm, are still liable under their nation's accession to these international laws. This is effectively an extension of state obligations to nonstate actors and international organizations. By doing this, although the entities do not necessarily have complete *judicial personality*, or the amount of international rights and duties ascribed to a given entity in the global order, they ought to be treated as such when it comes to actions taken to harm other states.

Finally, the paper revisits self-defense in Article 51 by basing it again on a violation of sovereign autonomy, with a proportionality caveat that ensures that nations do not use this system as justification for escalatory acts. Aggression is still aggression, regardless of if it is retaliatory. For example, a cyber-attack which only harms the economy cannot justify a retaliatory nuclear strike: this would be a complete abrogation of the spirit of the law and its role as a deterring mechanism.

Ultimately, these revisions can serve as bulwarks to the increasing complex threat domain which faces many nations in the 21st century. By adopting a change in diction such as this, nations are better able to understand the nuances of conflict and therefore act in their best interest more effectively.

The Solution in Light of Just War Theory

However, do these revisions meet the requisite components of Just War Theory and therefore fulfill the spirit of the law? As highlighted in the earlier section, the core tenets of each of the components of just war theory must not only address the critical changes in war's character, but also fit within the constraints of just war doctrine.

First, this paper examines the principle of last resort. Does including non-kinetic threats as means of last resort harm or benefit the ability to protect sovereignty? Seeing as the objective of last resort is to exhaust other means such as diplomacy and economics before going to damaging measures, this makes logical sense. Particularly, as a sort of cyber-attack can be viewed as violation of territorial integrity, limiting cyber methods and similar methods as last resort best

fits the spirit of Just War Theory, particularly as cyber can be a “primary last resort.” This approach would enable kinetics to remain further right on the spectrum of conflict, and yet have a deterrent policy in place to further regulate non-kinetic strikes, such as cyber.

Second, to examine the principle of proportionality under both *jus ad bellum* and *jus in bello*. Proportionality can now be equated to damages done. Critically, proportional does not mean the same, but rather regards the damages as equivalent. A nearly irreversible physical attack and reversible non-physical attack may produce the same result, but the reversibility of the non-physical attack means that an irreversible response must be to a lesser degree of damage. Although it is true that a building or structure can be rebuilt just as a bank account unfrozen, the logistical effort and time into the former option makes it impracticable should the damage be significant. Furthermore, loss of life and potential psychological damage is significantly higher in kinetic warfare than non-kinetic. Therefore, it is simpler to refer to a physical attack as irreversible, because of the high threshold necessary for reversal. That said, a physical attack, devastating and

irreversible, could also subsequently be met with a far more devastating but reversible non-physical attack. An example of this would be Anti-Satellite (ASAT) technology that can destroy opposing satellites. ASAT generates debris and retaliation would only generate more. However, it does fit into a kinetic attack definition, so non-kinetic responses ought to be considered first. For example, digitally severing data links could be a viable retaliatory measure, or potentially directing the response at the attacking vehicle's planetary control station. The nuances of this approach are difficult, but effective in providing a deterrent as well providing more retaliatory options while still maintaining a proportional balance.

Third, to examine the principle of non-combatant immunity. The trick with the introduction of non-state actors and the use of non-military methods of aggression is that most of these actions are carried out by civilians. Therefore, to solve this issue, this paper refers to the principle of active engagement in hostilities. As Orend writes, "The clearest sense of who is innocent in wartime [is] all those not engaged in

creating harm.”³³ When examining this principle, it becomes evident that the harm caused by other types of entities ought to receive the same treatment. Looking at examples of this, such as the PLA naval-controlled Chinese fishing fleet, they are not always engaged in creating harm, but instead are always on call. This sort of ambiguity can become a significant quagmire but adopting a process of treating the fleet as hostiles will compel the PLA to stop using functional “human-shield” tactics. Therefore, by including nonstate actors as hostiles, it enables retaliation against them without violating the principle of non-combatant immunity.

Fourth, to examine the principle of No Means *Mala in Se*. In no cases are the actions taken inherently evil for the sake of evil. Therefore, there are not any significant issues with the nature of these revisions in regard to the revision of LOAC.

Ultimately, by revising the letter of LOAC such that the spirit of the law is still fulfilled, nations can be better equipped with the legal authority and judicial personality to maintain their own national autonomy.

Criticisms of Solution

³³ Brian Orend. *The Morality of War*. 2d ed. Peterborough, Ontario: Broadview Press, 116, (2013).

However, this solution set is not without its criticisms. For example, one might argue that the advantage of the legal ambiguity enables nations like the U.S. to garner information and to take actions otherwise violations under the revisions. Contrarily, simply because we can do something does not mean we ought. Deontologically, violating another entity's sovereignty is inherently wrong. Teleologically, this is a two-way gray area. Nations are just as apt to attack the U.S. and could potentially inflict more damage. Finally, at a most basic level, the potential chance of these actions causing significant harm is enough to warrant a deterrent and prohibitive policy for such action.

Yet, to address the most pressing counterexamples to my fundamental premise: what of the invasion of Ukraine (2022) or the potential invasion of Taiwan by the PLA? Ukraine, a concrete example of a twenty-first century kinetic war may demonstrate that kinetic war is not obsolete, but still boasts significant non-kinetic components.³⁴ For example,

³⁴ Zabrodskyi, M. *et al.* *Preliminary lessons in conventional warfighting from Russia's invasion of Ukraine: February–July 2022*, Royal United Services Institute. The Royal United Services Institute for Defence and Security Studies. (2022) <https://rusi.org/explore-our-research/publications/special-resources/preliminary-lessons-conventional-warfighting-russias-invasion-ukraine-february-july-2022>

from the use of Starlink to the weaponization of information and cyber-attacks, there are considerable gray areas which Russia operates in, and has operated in since their annexation of Crimea.³⁵ Furthermore, any sort of amphibious assault on Taiwan would likely not be similar to previous amphibious assaults, such as D-Day or U.S. Island Hopping³⁶. Ultimately, the ambiguity coupled with the increase of emerging technologies in the future fight would leave potential LOAC guidance at a disadvantage if the language is not appropriately updated.

Next, many argue that the War on Terror solves the issue of nonstate actors. Michael Byers writes “In 1998 and 2001, the [U.S.] invoked self-defense to justify military action in Afghanistan following terrorist attacks on U.S. targets first in Nairobi and Dar es Salaam, and then in NYC.”³⁷ However, this is merely an extension of the greater, codified policy advocated in this paper, which argues that hostile entities

³⁵ Pettyjohn, Stacie L. and Wasser, Becca. *DTIC, ARROYO CENTER*. RAND Corporation. (2019) <https://apps.dtic.mil/sti/pdfs/ADA364024.pdf>.

³⁶ Easton, I. *Why a Taiwan invasion would look nothing like D-day*, *The Diplomat*. (2021) <https://thediplomat.com/2021/05/why-a-taiwan-invasion-would-look-nothing-like-d-day/>

³⁷ Michael Byers, *War Law: Understanding International Law and Armed Conflict*. (2007) https://books.google.com/books/about/War_Law.html?id=6f9Di2nq1hQC

existing within a sovereign territory are that sovereign territories' responsibility. Just as the U.S. cannot harbor terrorist cells, neither can another nation. Therefore, the paper argues that this is an example of an unspoken adherence to the principles advocated.

Also, is incorporation of cyber action into the same category as military action a wise grouping? This is one of the most critical questions to answer as it sets whether acts of violence are the prerequisite for LOAC to be applied. Functionally, LOAC refers to *armed* conflict, not just conflict. Yet, when examining the potential effects of cyber-attacks, though not always the case, they do indeed have potential produce similar levels of damage and are often used in conjunction with military operations. Furthermore, cyber is used extensively for espionage and often military espionage. Therefore, by including cyber operations under military operations, it groups them by effect rather than means of producing that effect.

Furthermore, what of the other aspects of DIME? At their core, these revisions seek to enable actors to have less freedom before reaching a level of conflict and more

afterwards. By changing the paradigm of proportionality, it forces more nations to seek the DI E of DIME first to avoid a more unpredictable and potentially worse outcome than initially anticipated.

Additionally, what of the implantability of this solution. The international community seldom cooperates on issues which limit their actions and not only applying this language to a treaty, but compelling ascension, agreement, and cooperation within the international community. Particularly, many nations rely on new technology to operate in gray areas and it seems unlikely that those actors would be amenable to making such changes to the international order. Therefore, to effectively make these changes, many of these actors would have to coalesce around the ideal of minimizing harm to their nations and likely put aside many differences. In the 21st century, this admittedly feels unlikely, but aspirational change can still provide some progress on the issue of emerging technology and LOAC.

Finally, what about internal conflict? Most of my principles focus on how non-state actors could attack other groups. How does this law deal with acts where a nation seeks

to quell a rebellion, military coups, domestic terrorism, and similar situations? These are better supported under my revisions. No longer can an internal purge of dissenters be viewed as a strictly internal matter. In an increasingly globalizing world, it is paramount to protect interest groups and private entities. Now, before anyone argues that this solution is giving every extremist group in the world a blank check to retaliate against their government, there is one critical caveat: the social contract. Although these vary from nation to nation, the foundational agreement between the people and a government enables the exercise of law and order as well as spell out government duties to uphold the people's rights. The U.N. Declaration of Human Rights outlines more commonly accepted ones, although entire libraries could be dedicated to determining what, particularly, those rights ought to be.

Overall, though there are some criticisms of my proposed solution, this is still the best way forward to establish a more peaceful future in light of the changing character of war.

Conclusion

The changes in the character of war over the years since the founding of the U.N. have left LOAC archaic considering new means of fighting. Therefore, this paper proposes a series of revisions to LOAC in light of Just War Theory and ultimately demonstrate how the Law of Armed Conflict can be updated for the future fight. It redefines the language of LOAC and demonstrates through that the spirit of the law can be fulfilled. In doing so, there can be greater pursuance of peace through closing loopholes which allow bad actors to harm states and other entities. Furthermore, through examining it through Just War Theory, the law can be retooled to fit the spirit of the law more closely as opposed to the mere letter. With these changes there may be potential to effectively bring LOAC into the twenty-first century and allow for the advancement of technology without it usurping the power of conflict. Ultimately, as war's character changes, it falls on the international community's understanding to change with it, and in doing so ensure that better peace and security can be maintained for decades to come.